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**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

01-27-2003

U.S. Patent & TMO/TM Mail Rpt Dt. #70

PUCCEL ENTERPRISES, INC.
Petitioner,

CONSOLIDATED

v.

GRIZZLY INDUSTRIAL, INC.
Respondent.

Opposition No. 123,506
Cancellation No. 31,984
Cancellation No. 32,024
Cancellation No. 32,025

Mark: GRIZZLY.COM
Mark: GRIZZLY
Mark: GRIZZLY
Mark: GRIZZLY INDUSTRIAL

**GRIZZLY INDUSTRIAL, INC.'S REPLY IN SUPPORT
OF ITS MOTION TO COMPEL DISCOVERY**

Although Pucel would gloss over its failure to respond properly to Grizzly's discovery, Pucel concedes on the first page of its opposition that it has not fully responded. Instead of providing the documents it has promised since at least May 2002, Pucel alleges that it is still "gathering" documents and will send these documents to Grizzly "soon." (Opp. at 1 n.1). Instead of responding to interrogatories, Pucel now alleges, for the first time, that Grizzly's interrogatories are "questions best answered in deposition." (Opp. at 1 n. 1). Tellingly, Pucel does not dispute that the information sought is relevant to the proceeding and/or likely to lead to admissible evidence. Instead, Pucel simply seeks to delay further its response. These continuing indefinite delays are one of the grounds for Grizzly's motion to compel. Thus, Pucel's response actually further supports Grizzly's motion, and underscores the need for the Board to grant Grizzly's motion to compel.

I. PUCCEL CONCEDES THAT ITS RESPONSES TO INTERROGATORIES ARE LACKING

Grizzly has moved the Board to compel Pucel to fully respond to Interrogatory Nos. 5(d), 7-13 and 15. While Pucel is making progress, its responses are not yet adequate. As best understood, Pucel seems to assert that it shouldn't have to answer Grizzly's interrogatories

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because it has some unidentified documents that might answer Grizzly's interrogatories or because Grizzly could get the answers at deposition¹ or from other interrogatory answers.

Cast in its best light, Pucel's opposition indicates that it lacks a basic understanding of how interrogatories work. Interrogatories are supposed to be an economical method of obtaining information that draws on the collective knowledge of the answering party. Pucel cannot unilaterally decide to limit Grizzly to discovery by deposition or force Grizzly to guess what Pucel's responsive documents may be.

A. PUCEL CANNOT REQUIRE GRIZZLY TO OBTAIN INTERROGATORY ANSWERS THROUGH DEPOSITIONS

Pucel's idea of forcing Grizzly to wait for depositions to obtain the information sought by Grizzly's interrogatories has been previously dismissed by other tribunals. "In this respect, we agree with the Courts which have preceded us in recognizing the superiority of Interrogatories in effectively ferreting out information that could be ascertained by the more invasive and costly means of a deposition -- at least as a classic instrument of first-wave discovery." *In re Potash Antitrust Litig.*, 161 F.R.D. 405, 409 (D. Minn. 1995), (citing *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 307 (S.D.N.Y. 1982); *Casson Const. Co. v. Armco Steel Corp.*, 91 F.R.D. 376, 380-81 (D. Kan. 1980); *In re Folding Carton Antitrust Litig.*, 76 F.R.D. 417, 419 (N.D. Ill. 1977)).

Asserting that Grizzly's interrogatories are "questions best answered in deposition" is not an adequate response. "Interrogatories may seek any information which is discoverable under FRCP 26(b)(1)." TBMP 406.02. Certainly, Grizzly does not expect too much when it asks that

¹ Grizzly has been attempting to secure the deposition of Pucel and its principals since late December, but so far Pucel's counsel has only asserted the non-availability of the deponents on the dates selected by Grizzly's counsel and has to date not provided dates on which its deponents are available.

Pucel explain what companies are referred to in its response to Interrogatory No. 11 that “companies having GRIZZLY as part of their names are known.” Similarly, Pucel’s terse answer to Interrogatory No. 13 does not properly describe what happened, who participated, or in any way set forth sufficient details for Grizzly to determine what, if any, kind of confusion occurred.

B. PUCEL CANNOT ANSWER INTERROGATORIES BY REFERRING TO UNIDENTIFIED DOCUMENTS OR BY CLAIMING THAT OTHER, UNIDENTIFIED INTERROGATORIES SEEK THE SAME INFORMATION

Pucel has not provided any indication that it has even reviewed its own interrogatory responses in which Pucel conceded that it had information in additional documents that it has not identified. Moreover, Pucel has not provided any indication that it can simply substitute a search by Grizzly through Pucel’s records by meeting the three prerequisites of Rule 33(d). First, that answering the interrogatories in writing would “impose a significant burden on the responding party, a burden which is above and beyond the normal burden involved in providing written responses to interrogatories.” *Jain v. Ramparts Inc.*, 49 U.S.P.Q.2d 1429, 1433 (TTAB 1998). Second, that Pucel must identify the responsive records with specificity because “[a] party which responds to an interrogatory ‘by directing the interrogating party to a mass of business records or by offering to make all of their records available, justifying the response by the option provided by this subdivision,’ is abusing the option provided by Rule 33(d).” *Id.*, quoting *Advisory Comm. notes (1980 Am.)*. Third, Pucel must establish that the burden of compiling the information by Grizzly is “substantially the same” even though Pucel has greater familiarity with its own business records. *Id.* at 1433-34.

Here, Pucel cannot meet any of the prerequisites and its claim that Grizzly should simply derive the answers from Pucel’s business records should not be accepted. Grizzly’s

interrogatories are “straightforward in form and unexceptional in subject matter and scope for this type of proceeding.” *Id.* at 1435.

If Pucel believes that its documents are “responsive to some of the interrogatories” (Br. at 2), then it should supplement its interrogatory responses to refer specifically to these documents by document control number. For instance, Interrogatory No. 5(d) seeks “the identity of all documents which relate to [Pucel]s] knowledge of Respondent’s trademark GRIZZLY.” Pucel’s response was “Catalogs, various publications and websites.” Similarly, Pucel’s response to Interrogatory No. 12, relating to communications with others regarding rights in the GRIZZLY mark, states (after two companies are named, but no description of the communication is presented) “Also see documents which are being produced for inspection and copying.” Pucel’s response to Interrogatory No. 13, which sought to have each instance of confusion described, states (after a list of names, each of which has from one to eight words that apparently describe the instance, but no information is presented as to who was informed of the purported confusion, or what kind of “inquiry” was made, etc.) “Documents which relate to these instances of actual confusion will be produced for inspection and copying” (emphasis added). Tellingly, Pucel asserts in its response to Interrogatory No. 15 (seeking facts and documents that Pucel intends to rely on) that “documents identified in these interrogatories ... are being produced and represent some but not all of the documents upon which Petitioner will rely” (emphasis added).

Whether Grizzly has asked related interrogatories is not a sufficient reason for Pucel to refuse to provide the information in response to these interrogatories.²

Pucel's responses hardly serve to identify the documents which Pucel seems to claim would be responsive to Grizzly's interrogatories. (Opp. at 2). To date, Pucel has not supplemented its interrogatory responses to identify the documents or to provide the information in written form. It is inappropriate for Pucel to put that burden on Grizzly. Instead, Pucel should simply answer the interrogatories, whether by referring to specific documents or by putting the information in writing.

D. PUCEL COULD AMEND ITS ANSWERS TO INTERROGATORY NOS. 9 AND 10 TO SATISFY GRIZZLY'S MOTION WITH RESPECT TO THESE TWO INTERROGATORIES

On December 30, three days after Grizzly filed this motion on December 27, 2002, Pucel provided a sheet captioned "Pucel Enterprises, Inc." with three columns captioned: Year, Sales, and Advertising. The sheet includes dates as early as 1949 (with some gaps). Although it appears that this sheet was prepared in response to Grizzly's interrogatories and that the columns reflect its advertising and promotion costs (see Interrogatory No. 9) and its gross annual dollar sales (see Interrogatory No. 10), Pucel has not so supplemented its responses. Thus, this data is unverified and no statement relating thereto has been made under oath. If Pucel were to amend its responses to Interrogatory Nos. 9 and 10 to incorporate this information and clarify that the columns reflect its advertising and promotion costs and its gross annual dollar sales, Grizzly would agree that the motion with respect to these two interrogatories is resolved. *See* 37 CFR § 2.120(e).

² Grizzly is not satisfied with Pucel's responses to Grizzly's later-served interrogatories, but is still attempting to resolve this matter without requiring the Board's intervention.

II. PUCEL CONCEDES THAT ITS RESPONSES TO DOCUMENT REQUESTS ARE LACKING

Pucel concedes that it has documents that are responsive to Grizzly's document requests, but *still* has not produced them. That such documents will be sent to Applicant "soon" provides Applicant no comfort because Applicant has been hearing this since May 2002. Moreover, Pucel now disingenuously claims that it actually produced relevant, non-invoice documents for inspection at its Ohio facilities.

Specifically, Pucel claims that "many other (non-invoice) business documents related to the Pucel Grizzly® Equipment business" were in the 200 boxes of documents that Grizzly was permitted to inspect in December 2002. This claim is false.

Pucel's counsel represented to Grizzly's counsel at the time of inspection that the designated boxes contained only invoices and internal product order forms and refused to allow Grizzly's counsel to inspect any other documents, despite acknowledging that he knew other, relevant documents existed which he would produce in a couple of days. (Motta Decl. ¶¶4, 7). Grizzly's counsel inspected the designated boxes and confirmed that they contained only invoices and order forms. (Motta Decl. at ¶5). For Pucel's counsel now to claim that the two hundred boxes actually contain documents other than invoices and order forms and that Grizzly should have located these documents is specious.

Indeed, if Pucel knew that its two hundred boxes contained non-invoice documents that were responsive to other document requests of Grizzly, then Pucel was obligated to identify for Grizzly where the responsive documents were and the nature of the documents. Having failed to do so, Pucel should be ordered to copy and mail all responsive documents to Grizzly. *Jain*, 49 U.S.P.Q.2d at 1432.

Pucel chose to dispute *only* the adequacy of its response to Document Request No. 1 (seeking samples of all documents and things showing how Pucel markets, distributes and sells

products in connection with its Grizzly marks) and, perhaps No. 2 (seeking documents which identify all the products advertised, sold or intended to be sold by Pucel in connection with its Grizzly marks), by asserting that the requests were overly broad. With respect to Request No. 1, Grizzly has not sought to compel Pucel to produce all such documents and things, but only a representative sample of them. *See* TBMP 419(2). Pucel has not indicated that it has even complied with that. With respect to No. 2, Pucel should be able to provide documents that “identify all of the products advertised, sold or intended to be sold ... in connection with the marks GRIZZLY and GRIZZLY BEAR SYMBOL.” This is not an unduly burdensome request.

Pucel’s own responses to Grizzly’s document requests indicated that Pucel would be producing documents for inspection and copying that are responsive to many other requests, *e.g.*, Request Nos. 3 (date of first use), 9 (channels of trade), 11 (annual sales), 12 (annual advertising and promotional expenses), 13 (instances of confusion), 18 (documents relating to Grizzly), and 20 (documents relating to the allegation that Pucel has been using its marks continuously), 21 (documents relating to the allegation that its use, advertisement and promotion of the marks has created valuable good will in the marks and a recognition in the public that the goods originate with Pucel), and 22 (documents relating to the allegation that its goods are offered through the same channels of commerce and to the same purchasers as Grizzly’s goods). With the possible exception of the document captioned “Pucel Enterprises, Inc.” (described above), which was produced December 30 and might satisfy Grizzly’s Document Request Nos. 11 and 12 (if Pucel were to identify it as such) and the invoices which Grizzly has inspected and copied samples,³

³ Pucel has redacted information that would identify its customers and the prices of its goods from the invoices. Thus, the invoices do not allow Grizzly to determine the channels of trade or whether Pucel’s goods are impulse items.

Pucel has not *identified* such additional documents to Grizzly. Instead, it has produced a box of jumbled documents and told Grizzly to sort them out.

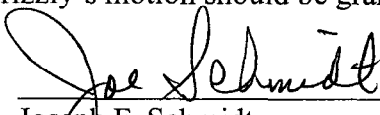
The other requests Pucel has not even addressed, specifically Document Request Nos. 4 (documents relating to trademark registrations and applications), 5 (privilege log is missing), and Pucel's failure to identify any responsive documents with respect to the other requests is simply glossed over by claiming that "the documents are self-evident as to the requests to which they respond." (Opp. at 2). If they were self-evident, then Grizzly would not need to bring this motion (and Pucel should be able to readily respond). Nonetheless, Pucel should identify which documents it has produced or is producing correspond to which requests rather than expect Grizzly to so identify them, especially in view of Pucel's repeated claim that it would be producing other documents.

CONCLUSION

Grizzly respectfully urges the Board to review closely Pucel's allegations with respect to what it would be producing and when. Pucel has not managed to fulfill any of its commitments in a timely way. Pucel should be compelled to commit its interrogatory answers to writing and to identify its responsive documents forthwith so that this proceeding can move forward.

For the foregoing reasons, Grizzly's motion should be granted.

January 20, 2003



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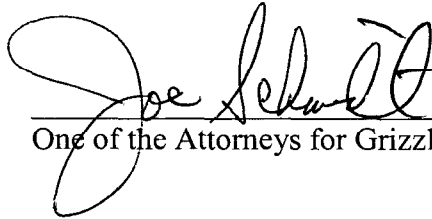
Grizzly Industrial, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing GRIZZLY INDUSTRIAL, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL DISCOVERY was served on

Kenneth L. Mitchell, Esq.
Woodling, Krost and Rust
9213 Chillicothe Road
Kirtland, OH 44094

via first class mail, postage prepaid, this 20th day of January, 2003.

A handwritten signature in black ink, appearing to read "Joe Schmitt", is written over a horizontal line.

One of the Attorneys for Grizzly Industrial, Inc.

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**DECLARATION OF PATRICIA MOTTA
IN SUPPORT OF GRIZZLY'S MOTION TO COMPEL**

I, Patricia Motta, state as follows:

1. Together with the law firm of MICHAEL BEST & FRIEDRICH, LLC, I serve as co-counsel for Grizzly Industrial, Inc. (Grizzly) in the above-captioned proceeding.
2. On December 16, 2002, I went to the facilities of Pucel Enterprises, Inc. (Pucel) in Cleveland, Ohio to inspect documents.
3. When I arrived, Pucel's counsel, Kenneth L. Mitchell, informed me that I was permitted to inspect only boxes found in one small area of the storage room even though there were additional boxes in the storage room and on shelving near the boxes I was permitted to inspect.
4. Mr. Mitchell further indicated that I would find that most of these boxes contained only invoices and a handful of these boxes contained internal product order forms and that the boxes contained nothing else.
5. I inspected these boxes and confirmed that the great majority of boxes contained only invoices and that a handful of boxes contained internal product order forms.

6. I do not know what was in the other boxes because I was not permitted to inspect them.

7. Mr. Mitchell acknowledged to me that he had additional, relevant documents, but refused to let me inspect them. Instead, he indicated that he would produce them within a couple of days of the inspection.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

January 20, 2003

Date

Patricia Motta

Patricia Motta